SIR ARTHUR SULLIVAN AND PIRACY.

BY ALEXANDER P. BROWNE.

"'PINAFORE'—now being performed simultaneously in over one hundred theatres in America!"

Such was the announcement that, in 1879, covered the billboards and dead-walls of London. Brief as it was, it was full of suggestion. It marked the opening of a new field for the foreign author, the American dramatic pirate, and the legal profession, irrespective of nationality.

In it English, French, and German authors and composers hailed the tidings of a new market for their wares—a new and brilliant prospect of exchanging the work of their brain for the proverbially plentiful American dollar. The dramatic pirate chuckled to himself at the chance of capturing and looting many a richly-laden bark, tossed and baffled on the troubled seas of international non-copyright. The lawyers began to rummage among their books for points and precedents, not without a comfortable premonition of long and lucrative battles to come.

The success of "Pinafore" made the names of its authors a household word on both sides of the Atlantic. More than that, it produced the dramatic trade-mark "Gilbert and Sullivan," which to-day stands for actual millions of profit to its owner, Richard D'Oyly Carte, of London. As people there used to say, "Carte invented Gilbert and Sullivan." Having made the invention, he patented it to himself by an exclusive contract with the author and composer, and from the profits of "Pinafore" he bought outright a piece of land in perhaps the highest-priced quarter of London and built on it his own theatre, the Savoy. His English establishment being thus put in order, he turned his attention to the American market. He had already shown him-

self a good business man and a hard fighter for his rights, and Gilbert and Sullivan, knowing this, intrusted to his management their future battles for Yankee dollars.

When the "Pirates of Penzance," the successor of "Pinafore," appeared, the outlook for it in "America," as Englishmen call the United States, was not encouraging. "Pinafore's" success had developed in this country a horde of men for whom that opera had made a considerable sum of money. With the taste of blood in their mouths, they pricked up their ears at the news of further prey; they even quarrelled among themselves, in advance, as to the distribution of the booty. Some of these men were, and long had been, the managers of well-known theatres and in good and regular standing in the profession; but the majority belonged to that class of penniless theatrical speculators who, in the expressive slang of the trade, are now known as "fly-by-nights" or "snides." This union of classes, the worthy and the worthless, showed well the lamentable state of public opinion then existing as to the propriety of appropriating other people's ideas without paying for them. In those days even the newspapers laughed at our efforts to protect such property in the courts, and in this way did much to salve the consciences of those managers who appeared to possess any.

Appeals to "public opinion," "the self-respect of the American art-loving community," and similar phantasms having been tried in vain with "Pinafore," Carte decided to adopt different methods with the "Pirates." It so happened that, whatever the defects of our statutes, our common and unwritten law recognized fully the exclusive right of a foreign author to do everything he might like with his manuscript, except to publish copies of it. The latter privilege would seem a reasonable one, too; but, as a matter of fact, it did not exist. However, the half-loaf of dramatic bread thus promised appeared better than no bread at all. It was decided to keep both the words and music of the "Pirates" scrupulously in manuscript until the piece had been thoroughly run in New York, Boston, and other large cities, thus insuring at least the cream of the business to those to whom the whole of it morally belonged. This plan worked well enough financially, but it was very distasteful both to the author and the composer. Naturally enough, Gilbert, having written his book, wanted people to read it, and Sullivan had the same reasonable wish for his music

—that the lovers of it should have it at home to play over and enjoy. But under our laws it could not be; a foreign author could hold his right of unlimited performance indefinitely until he published either at home or here, but when that day came, good-bye to any further American income for him.

The right of controlling the performance of a manuscript piece I have spoken of as settled in the law, and so it undoubtedly is now, but in the "Pirates" days our courts were very wabbly and uncertain about it. In a case in Massachusetts in 1861, Laura Keene was the fair plaintiff and the stolen goods consisted of "Our American Cousin." The Supreme Court held that you or I might perform for profit as much of anybody's else dramatic property as we could remember, although we would not be allowed to eke out our memory by taking notes. But if we did not have a good memory ourselves, we might employ some one who did, which was actually done in the Keene case. Of course, this was not a sound view of the law. Various writers promptly pointed out the absurdity of the distinction between purloining with the mind and with a lead-pencil, and the case as authority was generally derided. Nevertheless, when the new opera came, in 1880, *Keene v. Kimball* was still available as a sort of cave or refuge for the pirates of the drama, and they hastened to avail themselves of its shelter.

My first dramatic fight was with a pirate of this variety. A certain music-publishing house of high standing put upon the Boston market a *pot-pourri* entitled "Recollections of the Pirates of Penzance." As no music from the opera had before been published, the "Recollections" sold at a great rate. To the general public, the first part of the title probably conveyed no particular idea; they paid more attention to the "Pirates of Penzance" part. To us, however, it was a shout of defiance from the Cave of Memory before mentioned—in other words, the Keene case. "Ha! ha!" cried the pirates from their legal fastnesses, "capture us if you can!" Meanwhile they were busy filling their own pockets with the money which rightfully belonged to the despised foreigners. Human nature naturally could not stand this; so an injunction was asked for, albeit with great misgivings as to the result. They proved to be unfounded. Judge Lowell at that time was the United States Circuit Judge. When the defendant's counsel expressed his reliance on *Keene v. Kimball* as authority, the Court

expressed without reservation its dissent from the doctrine of that case, and granted us our injunction.

Judge Lowell's decision as to "memorizing" had now become pretty widely spread among the would-be robbers of the Northern States, but the Southern managers were still unenlightened and unterrified. Carte next produced "Billee Taylor," over which we had a hand-to-hand encounter in Baltimore before the United States Judge there. Our opponent was Ford, a well-known local manager. His version of the play, so he testified, had been taken from our own by memory. We admitted the taking, for the two were almost identical, but denied the memory part of it. We were morally certain, in our own minds, that a more reliable agent had been employed, viz., a little money judiciously administered to some of our under people, and, in return, the surreptitious loaning of our prompt-book to the agents of the enemy. But the proofs of this were defective. Furthermore, *Keene v. Kimball* had not then been publicly overruled, for Judge Lowell had not published any formal opinion in our "Recollections" case. So the main part of our injunction was denied by the Maryland Judge, who treated *Keene v. Kimball* as authoritative. All that we saved from the wreck, so to speak, was a vast amount of free newspaper advertising—for the case was widely discussed—and an order that our "printing," or illustrated posters, should not be too closely imitated by our competitors.

The gloom of defeat in the "Billee Taylor" case, which was tried in 1881, lasted until May, 1882, when the decision in "The World" case appeared and the memorizing ghost was laid. This was the case where one Byron, the so-called "Boy Tragedian," had been expressly employed, on account of his wonderful memory, to steal the play of "The World," and had accomplished the feat of committing the whole of a long melodrama to memory in only two attendances. The performance of the version so stolen was enjoined by the Supreme Court of the State, and in the course of their opinion the "memorizing doctrine," as it was called, was completely and finally disposed of.

Not long after this, another ray of light broke through the cloudy sky of copyright litigation. Gounod's "Redemption" had recently been produced in England and was attracting considerable attention. Its English owners, the well-known house of Novello & Co., sold the American rights of producing the work

to Theodore Thomas, and performances of it by the celebrated Thomas orchestra were duly announced in all the great cities. Works of this magnitude and character had not before suffered at the hands of the American spoiler; so no one, at least among those most interested, was at all prepared for the following announcement, which suddenly made its appearance in the Boston papers:

BOSTON THEATRE.
SUNDAY EVENING, JANUARY 21, 1883.
First Performance in Boston of
GOUNOD'S REDEMPTION,
WITH NEW ORCHESTRATION ARRANGED
from Indications in
THE PUBLISHED PIANO-FORTE SCORE.

It was once more the shout of the pirate. The Cave of Memory having been knocked to pieces, he had found another shelter, and the announcement showed just what it was.

It so happened that the "piano-forte arrangement" of the "Redemption" was made by an English composer of reputation, Mr. Berthold Tours. With a laudable desire to add to the completeness of his work, he has printed in here and there, above the musical staff, such expressions as "Fag," "Wind and Strings," "Timp," etc.—cryptogrammatic to the general public, but conveying to the musically-instructed person, in a very general way, the kind of effect which Gounod had produced at the place indicated, in his original work.

Such were the "indications" so pointedly referred to in the newspaper announcement, by the aid of which the "new orchestration" had been, or was to be, constructed. Of course, they were not in any reasonable sense indicative of anything, nor were they intended to be, but they offered a toe-hold for the attacking party who were striving to drive out Mr. Thomas, and the fight began.

Like most copyright fights, it took the form of a motion for a preliminary injunction, that being the speediest way of obtaining redress, if redress was to be obtained at all. The first question presented to Judge Lowell for decision was whether the "indications" were, in fact, of any importance or value as suggestive or indicative of the orchestral composition. As the experts on both

sides agreed that they were not, this question was easily disposed of. The second question was one of law, and much more important. The piano-forte arrangement was the work of a foreigner. It was already published both in England and this country. Of course it could have no American copyright protection. The second question then was: "Did the publication of the piano-forte arrangement—the version for that instrument—deprive the original orchestral work of the protection which it, remaining wholly in manuscript, would naturally enjoy?"

The industry of counsel on both sides had found prior decisions more or less analogous, but nothing which was in any way controlling or decisive. The point was one of new impression. In a written opinion, showing great care and ability, Judge Lowell held that the injunction should issue; that the exclusive right of performing the unpublished orchestral work had not been lost by the unprotected publication of the piano-forte book. The opinion held, as we had from the first admitted, that a performance of the music of the piano-forte version, entirely without orchestra, would be permitted; and, to the eternal disgrace of musical art, the "Redemption" was, in fact, afterward produced by Lennon in the Boston Theatre to the accompaniment of two pianos and a parlor organ!

This decision in the "Redemption" case was hailed with joy by our foreign friends. Of course, what was law for Gounod was law for Sullivan. "Iolanthe" was just then about to be produced, and we looked eagerly forward to the full enjoyment of the American market and the easy discomfiture of all our foes.

We did not have long to wait. Once more Mr. Ford, of Baltimore, was the purloiner; once more we advanced to give them battle,—and, alas for the glorious uncertainty of the law, once more we were completely routed. Judge Morris, also of the United States Court, was the instrument of our discomfiture. He fully recognized Judge Lowell's premises, but from them reached a diametrically opposite conclusion. The injunction was denied.

At this juncture there occurred to the writer a plan by which to avoid some of the uncertainties of the disputed "Redemption" doctrine, and to obtain, what we had never before had, a valid American copyright on a part, at least, of the work. The plan in question was so simple and obvious that the wonder is it had not

been hit upon before. It was merely to employ an American to make our next piano-forte arrangement for us. The opera of "Princess Ida" was then under way, and it was determined to try upon it the new scheme. Accordingly a competent Boston musician, Mr. George Lowell Tracy, was engaged and despatched to London. As soon as he arrived there, he was set to work, and the arrangement for the piano-forte was, before long, completed. Now to protect it by copyright in both countries. We knew that such work had already been declared by the courts sufficiently original in character to be the subject of copyright. We knew, too, that England, with a liberality that should be to our own law-makers a constant shame, gives to any alien author full copyright protection, provided only that he be, upon the day of first publication, bodily present within the borders of her realm. Furthermore, and fortunately for our scheme, our law does not insist upon any particular place of residence for the American author at the time of publication. Finally, by publishing the arrangement on the same day in London and New York, the law of each country would be complied with, so far as that matter was concerned.

So, with a free use of the cable, and not without several narrow escapes from disaster through a slip here and there, we succeeded in getting the "piano-forte book" of "Princess Ida" duly copyrighted to Mr. Tracy in both England and the United States. Now once more to the fray! Give us only a foe to fight, and the outlook for having victory perch on our banner would be bright indeed. For the first time we were disappointed through having no one to give us battle. The public here did not want "Princess Ida" enough to induce any one to steal it. However, we had not long to wait.

The marvellous popularity of the "Mikado," which next appeared, brought forth at once a host of would-be pirates. Our "piano-forte book," as in the case of "Princess Ida," was the work of Mr. Tracy and was duly copyrighted by him. The reader will understand that, save for this piano-forte book, no publication whatever of the music of the "Mikado" had been made. It was necessary, therefore, that whoever sought to produce the opera without license must do one of three things. He must either play it with piano-forte accompaniment alone, or if with orchestra, then his orchestral score must be either

stolen from Sullivan's unpublished score or prepared by amplifying our published and copyrighted piano-forte arrangement. As to the production with piano-forte alone we had no fears, for we knew that the public would not tolerate such a wretched substitute for the original. Theft from the unpublished orchestral score was also an unlikely event. The parts were kept with most jealous care, a trusty man being employed, whose sole duty it was to see that they were never out of his sight. He was, furthermore, instructed to report to us instantly the slightest indication of any attempt at copying or otherwise appropriating any part of the precious manuscript. The third and greatest danger was that some American manager of piratical tendencies would have an orchestration made from the copyrighted Tracy book, and use that orchestration in producing the opera.

We had not long to wait before this very thing was done, and by several different managers at once, in New York city itself. Mr. John Duff had gotten an illicit "Mikado" well under way at the Standard Theatre. We decided to make this our next object of attack, and straightway began a suit in equity for an injunction.

Our position was this: As I have said, our piano-forte arrangement was the work of an American citizen, and had been duly copyrighted as such. The airs in it were Sullivan's, and, as he was a foreigner, could not be protected; but the rest of the book, the accompaniment, was the work of our arranger and covered by his copyright, which, of course, we controlled. Now, our American statute says that, when a person copyrights a *dramatic* composition, he and his licensees shall have "the exclusive right of publicly performing the same." Mr. Duff admitted that his orchestral score was simply an expansion of the piano-forte book; a mere reärrangement of our copyrighted arrangement. Therefore, we argued, when Mr. Duff performs his opera with orchestra, he is performing what confessedly contains our copyrighted thing; and therefore he is performing that thing itself. The only question then that remained to be demonstrated to the court was this: "Is an arrangement for piano-forte of the music of an opera originally written for an orchestra, a *dramatic composition* within the meaning of our American copyright statute?"

Judge Wallace decided against us. At the outset of the published opinion, his Honor says, by way of gilding the pill he was about to administer to the unhappy foreigner: "No one questions

the justice of the claim of the author of an intellectual production to reap the fruits of his labor in every field where he has contributed to the enlightenment or the rational enjoyment of mankind. It was, therefore, entirely legitimate for the authors of this opera to avail themselves of any provision they could find in the laws of the United States, which might protect them in the right to control its dramatic representation in this country, and . . . the plan adopted was an ingenious one."

The opinion then proceeds to knock the plan on the head as follows:

"It does not seem open to fair doubt, that the literary part of an opera, together with the music of the voice parts, comprises all there is of the dramatic essence that lies in the action of the performers. The instrumental parts serve to emphasize the sentiments and intensify the emotions excited by the words and melodies. . . . . But the instrumental parts alone are inadequate to convey intelligently to the hearer the dramatic effect communicated by the language and movements of the actors.

"If the orchestration of an opera is not a dramatic composition, certainly the piano-forte arrangement cannot be, ... and the complainant falls short of a case for the relief asked, because representing the arrangement on the stage is not the representation of a dramatic composition, but of a musical composition, as to which the complainant's statutory title consists in the sole right of printing, copying, etc., and not of public representation.

"*While it is much to be regretted that our statutes do not, like the English statutes, protect the author or proprietor in all the uses to which literary property may be legitimately applied, it is not the judicial function to supply the defect.*"

From the last paragraph, the foundation cause of our defeat will be clearly perceived. It was a defect, a "hole," in our own copyright law, and one which concerns directly all my American fellow-citizens of musico-literary tendencies. Bear in mind that Judge Wallace says, in substance, this: "The orchestral part of an opera is not a dramatic composition, and the unlicensed performance of that part of the opera violates no provision of our copyright law."

Now let us suppose that an American composer, say John K. Paine, should collaborate with a foreign librettist, for example J. R. Planché, in the production of an international opera; can

they, or either of them, hold the American performing rights in the piece ?

This raises a serious question of musical copyright law, and one upon which there is little, if anything, in the way of legal precedent in this country. Judge Wallace, as we have seen, was inclined to discriminate in this respect between the melody and the accompaniment, and he held that, while the former might be considered a dramatic composition, the latter certainly was not. While criticism is ungracious that comes from the defeated party, I may be pardoned for suggesting here a question as to the soundness of the distinction, from which, when applied to such a subject as operatic music, it follows that so much of that music as is vocal is also dramatic, and so much as is instrumental is not. If the later works of Richard Wagner were to be judged by this standard, it is certain that the result would fail to commend itself to the musically-educated intellect. In the Duff case, Judge Wallace quoted with approval this statement from a text-book of authority: "Music designed to be interpreted by instruments alone can hardly be considered a dramatic work within the meaning of the law." Yet I venture, with great respect, to doubt very much if the lamented author of "Die Walküre," for example, would admit for a moment that those portions of his work "designed to be interpreted by instruments alone" were not as fully and entirely an essential part of his "music drama" as the rest, in which another instrument, namely, the human voice, was also called into play.

It seems to me that the question whether a musical composition is or is not also a "dramatic composition" within the meaning of our law depends upon the use for which it is primarily intended and adapted; and that if the air of such a composition is held to be dramatic, the accompaniment should be similarly regarded. However, the gods have decreed otherwise, and up to this writing there has been no reversal of that decree.

The validity of the copyright upon our American-made pianoforte book, so far as concerned its being reprinted by others, was not passed upon by Judge Wallace. The point has, however, been since decided by Judge Nelson, now a United States Judge for the Massachusetts District, and the validity of the copyright sustained, the case being *Carte v. Evans.*

Judge Nelson's opinion contains a full and instructive consideration of the questions presented, and the temptation to

quote at length from it is difficult to resist. I may be excused if I yield to this temptation so far as to reprint here a few remarks of the Court in reply to the claim of the defendant's counsel that our plan of employing an American manager was "a mere evasion of the copyright act."

"I am unable," says Judge Nelson, "to perceive how it can properly be called an evasion, if by that is meant a proceeding by which the letter or the spirit of the law is directly or indirectly violated. The thing copyrighted was an original work by an American composer, and therefore the lawful subject of copyright. All the steps taken to secure the copyright, and vest it in the plaintiff, were authorized by our statute. Undoubtedly the plan adopted displayed great ingenuity, and the effect is to vest in these foreign authors valuable American rights in their work; but there is nothing of evasion or violation of the law."

With the Evans case ends the history of our dramatic battles down to the present time. The legal result has been to increase considerably the protection which foreigners, in the absence of an international-copyright law, are entitled to enjoy in the United States. From the point of view of financial value to American managers of the privilege of playing the Gilbert and Sullivan operas with authority, the situation has greatly changed for the better. Nowadays, there is nearly as much of competition among our American friends for the privilege of production and payment of license-fees, as there was ten years ago to see which one could be the first to despoil us. Moreover, that the long and bitter litigation has not been without other pecuniary fruit is shown by the fact that the profits to the foreign proprietors upon the performances in the United States of the "Mikado" alone are said to have amounted to upwards of one hundred and twenty-five thousand dollars.

Of course, there is a remedy for all the turmoil and confusion that I have described. Men ought not to have to battle for the preservation of their property. To those who have read this story of the fight, the thought must, before this, have come, "Why not have international copyright?" And in reply the writer can only say with Echo, "Why not?"

ALEXANDER P. BROWNE.